United States Supreme Court

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

Statement of Appropriate Docket Entries.

August 30, 1960	Answer of Massachusetts Bonding & Insurance Company
October 6, 1960	Notice of Taking Testimony
November 15, 1960	Note of Issue and Statement of Readiness
November 21, 1960	Affidavit of Non-Readiness
November 21, 1960	Notice of Taking Testimony
November 25, 1960	Notice of Motion to Intervene
December 8, 1960	Stipulation Adjourning Motion
December 16, 1960	Pre-Trial Proceedings
December 21, 1960	Affidavit of Anthony B. Cataldo
December 21, 1960	Affidavit of Philip G. Fitz
January 5, 1961	Decision of Judge Mishler on Motion to Intervene Served November 21, 1960

Petitioner's Demand for Jury Trial Inscribed on Its First Pleading in This Action Attached to Motion to Intervene.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO., INC.,

Plaintiff,

against

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Defendant,

and

OVE GUSTAVSSON CONTRACTING CO., INC.,

Intervenor.

INTERVENOR'S PLEA.

TRIAL BY JURY DEMANDED

Reply Affidavit of Anthony B. Cataldo, Read in Support of Petitioner's Motion to Intervene.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANTHONY B. CATALDO, being duly sworn deposes and says that he is the attorney for the intervenor, Ove Gustavsson Contracting Co. Inc., and makes this affidavit in reply to the affidavit of Philip G. Fitz dated December 14, 1960 which allegedly is in opposition to the intervenor's motion to intervene in this litigation. At the outset, deponent wishes to correct the word "plaintiff" to the word "intervenor" at page "2" at the 15th line from the top. The claimed damages are due to the intervenor, not to the plaintiff. The word "plaintiff" was written in error and it should be corrected.

Contrary to what Mr. Fitz says about laches, there were no laches on the part of this intervenor. Though this action was commenced in April, 1960, the parties had been discussing the matter for the purpose of settlement for months before issue was finally joined.

Many efforts were made to settle this litigation by your deponent. Complete particulars of the claim of the general contractor against this use-plaintiff were given to the use-plaintiff. The claims were broken down in great detail and Mr. Fitz and his client visited the job-site, in the company of your deponent, in an effort to prove to them the amount of work that was necessarily done by the intervenor to correct the dressing which the use-plaintiff was supposed to have done to the lumber. On this visit, it was arranged for them to talk to one of the government inspectors who had rejected lumber and who confirmed that part to Mr. Fitz and his client. At least, two conferences were held at deponent's office. A third conference was held in the Court House. The intervenor's claim for damages and for delay amount to $23,500. It was an important

item for the intervenor and for that reason your deponent was quite anxious for Brown & Bryan Lumber Co. Inc. to understand the facts. Therefore, he submitted in support of the claim even the bills of his own supplier for services rendered and materials furnished in an effort to show the cost to the intervenor of correcting the lumber which had been wrongfully fabricated by the use-plaintiff. Yet, with all this attention and effort, the use-plaintiff remained arbitrarily unconvinced and offered to pay some $2,000. on account thereof. Consequently, when it became apparent in August that the settlement talks were not bearing any fruit, an answer was put in by your deponent in this case. Inasmuch as this suit was commenced against the surety only, the answer was put in on behalf of the surety. Subsequently; and while plaintiff was preparing the present motion to intervene, your deponent received a notice of deposition which the use-plaintiff wanted to take of the general contractor. Your deponent thereupon decided to await the outcome of the deposition before filing the motion. The deposition was taken and the transcript finally received by deponent on or about November 15, 1960. By November 26, 1960, your deponent completed the preparation of this motion, had the same executed by the intervenor and served it upon the use-plaintiff, making the same returnable at the earliest possible motion date, which was December 7, 1960. Two days before the said return date or on or about December 5, 1960, the use-plaintiff requested an adjournment of two weeks and presented a stipulation for signature, adjourning the motion to December 21, 1960 which brings the matter to date. The intervenor never delayed this matter and there can be no claim of that sort here. The use-plaintiff knows this. As a matter of fact, Mr. Fitz in a conversation before Judge Rayfiel on another proceeding in this matter, conceded that the intervenor should intervene and that he would not oppose this motion. That proceeding came

about by the fact that immediately after the transcript of the deposition was delivered to deponent and before deponent had an opportunity to take the deposition in discovery proceedings of the use-plaintiff, the use-plaintiff filed a notice of issue. Whereupon, your deponent filed an affidavit of non-readiness. A hearing was held upon the affidavit and the same was heard before Judge Rayfiel on November 22, 1960. It was explained to Judge Rayfiel that your deponent wanted to intervene in behalf of the general contractor and that he was then preparing the papers, and also, that he wanted to examine the use-plaintiff before trial. Mr. Fitz at that point, stated that he would have no opposition to the motion to intervene or to the taking of the deposition and on that account, the Judge said that since the trial could not be had anyway, before February, that that fact would give deponent sufficient time to proceed as planned. The pre-trial deposition of the use-plaintiff has been taken, while the motion to intervene, as stated above, is still before the court, undecided.

The matter to intervene is of great importance to the ends of justice for it would defeat plaintiff's cause of action. Therein lies the true objection of the use-plaintiff. In an action under the *Miller Act* such as this is, the general contractor has been given the right to intervene, if the surety alone is sued by the sub-contractor.

U. S. for the use and benefit of Poster Wheeler Corp. v. *American Surety Co.*, 142 F. (2) 726

The reason behind this is that in suing the surety alone, the surety is not able to defend on the basis of the defenses open to its principal, the general contractor, or rely upon the counterclaims which may be made by the general contractor, unless the general contractor is a party to the action.

Ettinger v. *National Surety Company*, 221 N. Y. 467, 470
Lasher v. *Williamson, et al.*, 55 N. Y. 619, 620
Elliot v. *Brady*, 192 N. Y. 221, 225
Gillespie v. *Torrance*, 25 N. Y. 306
Adamson v. *Adamson*, 251 App. Div. 187; 295 N.Y.S. 506, 510

There is lack of privity between the surety and obligee in the contract between the obligee and principal and this lack of privity prevents the surety from interposing either the defenses or the counterclaims of the principal against the obligee.

Wilton Mfg. Co. v. *Machinery & Metal Sales Co.*, 174 N.Y.S. 766
City of New York v. *Fidelity & Deposit Co. of Md.*, 253 App. Div. 676, 3 N.Y.S. (2) 714, 716, 717
Turner v. *Edison Storage Battery Co.*, 248 N. Y. 73
Guilane v. *Philco*, 98 N.Y.S. (2) 24

In *City of New York* v. *Fidelity & Deposit Co. of Md.*, supra, at pages 716, and 717 of the Supplemental Report, the Appellate Division said:

> "The action here is brought against the surety alone; hence the surety cannot avail itself of the claim of its principals against the plaintiff, City of New York. The rule is well established in New York State that, where a surety is sued alone, he can not avail himself of claims of the principal against a creditor. Gillespie v. Torrance, 25 N. Y. 306, 83 Am. Dec. 355; Lasher v. Williamson, 55 N. Y. 619; Elliot v. Brady, 192 N. Y. 221, 85 N. E. 69, 18 L.R.A. N. S. 600, 127 Am. St. Rep. 898. The claim of the principals in this case is not a mere failure of consideration, but an independent

claim and, not being due to the defendant, cannot be asserted by it. Gillespie v. Torrance, supra. If the defendant had the right to assert the counterclaim and have it allowed in this action, where the principals are not parties, it would bar the suit of the principals for the breach of contract. As no balance could be found in the surety's favor, in seeking to cancel plaintiff's claim for $8,295.61, the surety might thus destroy the claim of the principals for $52,700. Gillespie v. Torrance, supra, 25 N. Y. 306, at page 311, 82 Am. Dec. 355; 4 Williston on Contracts, Rev. Ed. ps. 1251 p. 3582."

Therefore, it is obvious that a suit by the sub-contractor who has no rightful claim against the general contractor has been artfully devised and brought against the surety alone, for the purpose of avoiding the defenses and offsets available to the general contractor. The general contractor is materially interested in this suit because of its indemnification agreement to the surety, either by express contract or the law of subrogation. A recovery by the plaintiff against the surety would be tantamount to a recovery against the general contractor, without litigation upon the general contractor's defenses and counterclaims. That, it is respectfully submitted, would work an undue injustice to the real party in interest, the general contractor. No amount of desire on the part of our courts to accelerate the calendar could compensate for the injustice that would be done if a denial to the general contractor of its right to intervene were to be made. Rule 24 of the Federal Rules of Civil Procedure would grant a party the right to intervene "as of right" where "(2) when the representative of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Both conditions are present in this law suit. Nor is the use-

plaintiff's right to bring this action so paramount that this court should deny the general contractor the rights accruing to it under the very contract the use-plaintiff actually contracted and under which it is asserting its right of recovery. As a litigant of equal standing with the use plaintiff, the general contractor should be permitted to come in to defend against that claim and to prosecute its counterclaims against the use-plaintiff. Also, this right should be permitted to be exercised without depriving the general contractor of its right to a jury trial. There will certainly be issues of fact which will be raised and those issues of fact should be submitted to the jury in the regular course of due administration of justice.

The use-plaintiff has alleged no prejudice and as a matter of fact, it could not allege any prejudice, because none has occurred by reason of any alleged delay in presenting this motion to intervene.

WHEREFORE, deponent respectfully prays this court to grant the intervenor's motion to intervene.

(Sworn to by Anthony B. Cataldo on December 20, 1960.)

Decision of Mishler, J. of January 5, 1961 Requiring Waiver of Jury Trial.

Motion to intervene pursuant to Rule 24 is granted upon condition that intervenor waive right to trial by jury, and serve a copy of the pleading attached to the moving papers, together with a copy of the order made pursuant to this decision, within five days after the entry of such order. The intervenor shall be ready for trial when the cause appears on the regular trial calendar for trial.

Settle order on two days notice.

JACOB MISHLER,
U. S. D. J.

Order Entered January 16, 1961 on Decision of Mishler, J. of January 5, 1960 Requiring the Waiver of a Jury Trial.

A motion having been made by Oye Gustavsson Contracting Co. Inc. to intervene in this action pursuant to Rule 24 of the Federal Rules of Civil Practice, and the said motion having come on to be heard on the 21st day of December, 1960,

Now upon reading the notice of motion dated November 26, 1960, the affidavit of Oye Gustavsson sworn to September 6, 1960, the intervenor's proposed pleading, the reply affidavit of Anthony B. Cataldo, attorney for the proposed intervenor, sworn to December 20, 1960, all in support of said motion, and the affidavit of Philip G. Fitz, attorney for plaintiff, sworn to December 14, 1960, in opposition thereto, and after hearing counsel for the above respective parties, and the Court after due deliberation having rendered its decision in writing dated January 5, 1961, it is

ORDERED that the said motion is granted, upon condition, however, that Oye Gustavsson Contracting Co. Inc., the proposed intervenor, waive a trial by jury or any right it may have to a trial by jury herein, by filing with the Clerk of this Court such waiver in writing and serving a copy thereof and a copy of a pleading together with a copy of this order, on the attorney for the plaintiff within five days from the date of the entry of this order, and provided further that the proposed intervenor shall be ready for trial when this cause appears on the regular trial calendar for trial.

Dated: Brooklyn, New York, January 16, 1961.

JACOB MISHLER,
U. S. D. J.

Waiver of Jury Trial Pursuant to Order of January 16, 1961.

The intervenor herein, pursuant to order of this Court dated January 16, 1961 does hereby waive a trial by jury in order to comply with the condition to intervene placed upon it as in said order directed. This waiver however is without prejudice to the right of the intervenor to claim upon an appeal, if any should intervene herein, that the said condition of waiving a jury trial was erroneous.

Dated: New York, New York, January 17, 1961.

ANTHONY B. CATALDO,
Attorney for Intervenor,
Ove Gustavsson Contracting Co.

To:

PHILIP G. FITZ, Esq.,
Attorney for Plaintiff.

Decision After Trial by Byers, District Judge.

(2027)

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 60-C-334

June 12, 1961

[SAME TITLE]

PHILIP G. FRITZ, Attorney for Plaintiff, By: William V. Homans, of Counsel.

ANTHONY B. CATALDO, Attorney for Defendant and Intervenor.

BYERS, D. J.:

This is a Miller Act case in which the Use Plaintiff is Browne & Bryan Lumber Co., Inc., the Defendant is Massachusetts Bonding and Insurance Company, and the General Contractor who has intervened, is Ove Gustavsson Contracting Co., Inc.; for convenience, the first named will (2028) be referred to as plaintiff, and the intervenor as defendant. The Bonding Company, while the nominal defendant, tenders no issues that require decision, for the controversy boils down to the defendant's contention that the plaintiff did not make deliveries in accordance with the contract entered into between these parties.

Decision After Trial by Byers, District Judge.

PLEADINGS

The complaint was filed April 6, 1960 and recited:

(a) A contract between defendant and the United States of December 12, 1958, wherein defendant agreed to furnish all labor, equipment and materials for the repair of the seal wall and replacement of fenders on Pier G in the Brooklyn Navy Yard. It bears number NBy 21183, specification number 21183-58.

(b) A performance bond in the penal sum of $158,768., and a payment bond in the penal sum of $79,384., conditioned for the prompt payment to all persons supplying labor and materials in connection with the said contract, which bond was accepted by the U. S. A.

(c) The entry into sub-contracts between January 29, 1959 and September 16, 1959 by the plaintiff with the (2029) defendant, the total sum payable being $27,723.85 which was said to include a New York City sales tax of $650.09 and a demurrage charge of $15.00.

(d) A modification of the foregoing on May 22, 1959, whereby the drilling of certain holes in the timbers was to be done by the defendant, whereby the contract cost of drilling holes not already accomplished, namely $9,378 holes, was no longer to be charged by the plaintiff against the defendant at the contract rate of 20¢ per hole; thus there was an allowance to the defendant as to such items amounting to $1,875.60, which the plaintiff has not charged against the defendant, so reducing the contract price above referred to, to the sum of $25,848.25; of this sum only $6,000 has been paid, leaving a balance due of $19,848.25 for which payment was demanded.

An answer was filed on August 30, 1960 which, in addition to denials of material allegations in the complaint

including the jurisdiction of the court, alleged that the plaintiff was in default under its contract with the defendant and that the latter is a necessary and indispensable party.

By motion granted January 5, 1961, the defendant (2030) was permitted to intervene and serve and file an answer. On January 18, 1961 there was filed an intervenor's "plea," which alleged that the plaintiff had failed to perform its contract with the defendant in the respects therein enumerated, namely,

> "* * * but the said lumber so delivered, was delivered undressed and unfabricated as specified in said contract, and other lumber was delivered in damaged condition which was duly rejected by the intervenor and the delivery of such part as was tendered was wholly or nearly so, delayed and that by reason thereof, the said use-plaintiff is and has been in default under the said contract."

The pleading continues that the intervenor supplied the necessary lumber and performed the work needed to dress and fabricate the lumber and did

> "incur the expense of supplying certain tools and machinery necessary to dress and fabricate said lumber to make the same fit for the purpose for which it was intended * * *."

Further, that intervenor demanded the delivery of 5,800 board feet of lumber to replace that quantity of lumber which had (2031) been received in damaged condition, and plaintiff's failure to supply.

It is averred that the defendant has suffered or incurred damage as indicated in the sum of $23,500., which has been demanded and refused. By a memo filed April

13, 1961 the sum is restated to be $21,918.56 which is sufficiently close to the original contract price (as reduced) of $25,848.25, to render the counterclaim suspect as being artificially inflated.

The second, separate cause of action is really a repetition of the foregoing.

An amended answer was filed February 9, 1961 in which the contract between the plaintiff and the defendant is pleaded and the alleged breach and default of the plaintiff thereunder, and an appropriate offset is sought.

The trial occupied twelve non-consecutive days between March 6 and April 5.

General Statement

Gustavsson had a contract with the Navy as above recited and in order to acquire timber needed for the fenders, he entered into the contract later to be set forth which gave rise to the issues to be decided. It is important to (2032) bear in mind that defendant's attorney appears likewise for the Bonding Company and while he is presenting the Gustavsson case as attorney for the latter, his client initially was the Bonding Company.

It should be said at once that the burden of proof is upon defendant, plaintiff having shown delivery of what it contracted to provide as will be demonstrated.

U. S. etc. v. *Wunderlich Contracting Co.*, 228 F. 2d 66 (p. 68);

U. S. etc. v. *American Surety*, 142 F. 2d 726 (p. 728);

U. S. ex rel. Johnson v. *Morley Const. Co.*, 98 F. 2d 781 (p. 789);

U. S. etc. v. *McCay*, 28 F. 2d 777 (Point 10, p. 780).

Decision After Trial by Byers, District Judge.

It will be convenient to state the respective Findings, with appropriate comment.

FINDINGS

1. Defendant's contract with the Navy is dated December 12, 1958 for "Repair Seawall and Replace Fenders Pier 'G', complete and ready for use." "No. NBY-21183" Amount $158,768 Work to be started December 17, 1958, to (2033) be completed November 12, 1959. The following clause appears:

> "IV. The undersigned [the defendant] agrees to perform on site and with his [sic] own forces the following work; namely, concrete construction and timber work."

The foregoing is Plaintiff's Exhibit 1.

2. Defendant has been paid in full by the Government the entire said contract price, plus $37,025. for extras, making a total of $195,793.

The foregoing was reluctantly established at the trial and is not disputed.

3. The written contract between these parties was initiated by a written tender by plaintiff dated December 15, 1958 bearing the notation, signed by defendant's president, reading: "1/16/59 O.K. to proceed with ordering lumber hold fab [fabrication] for confirmation." Thus Plaintiff's Exhibit 2.

The contract itself is embodied in plaintiff's letter to defendant dated January 29, 1959, approved by defendant February 2, 1959:

Decision After Trial by Byers, District Judge.

(2034)

Letterhead of Browne & Bryan Lumber Company, Inc.
Grand Central Terminal, New York 17, N. Y.

January 29, 1959

"Mr. Ove Gustavsson
135 Lakeville Road
New Hyde Park, New York

Re: NavDocks Spec. No. 21183/58—Repair Sea Wall and Replace Fenders Pier 'G' New York Naval Shipyard, Brooklyn, N. Y.

Dear Sir:

We herewith confirm your order of January 16th and have proceeded with the following:

White Oak, Common Dimension (Freight Car Stock) in accordance with NHLA Rules:

Dressed Four Sides—Standard:

Posts—170 Required:

12 x 12 170/10′ (x/cut to 9′0″) (20400′ BM) @ $147.00 per M′BM

2″ Chamfer—2 corners one end.

1 Dado—1½″ x 14″.

2 Dadoes—1″ x 13¾″. @ $4.50 per stick

2 thru holes for 3½″ Galv. Pipe.

12 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia.

2—1″ thru holes to allow ¾″ bolt to go thru 3½″ pipe @ $ .20 per hole.

(2035) *Fenders—170 Required*:

12 x 14 170/16′ (38080′BM) @ $157.00 per M′BM

2″ Longitudinal Chamfer—2 edges.

3 Dadoes—1½″ x 11¾″.

6 Dadoes—1″ x 9¾″.

1 Bevel Cut—5″ x 5″.

1 Bevel Cut—6¾″ x 14″. @ $ 11.10 per stick.

6 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia. @ $ .20 per hole.

Wales—510 Required:

10 x 12 510/8′ (40600′BM) @ $147.00 per M′BM

4 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia.

6 thru holes for 1″ Galv. Bolts @ $ .20 per hole.

Chocks—510 Required:

10 x 10 7′6″ (x/ cut to 7′2½″) (31875′BM) @ $147.00 per M′BM

1½″ Longitudinal Chamfer—2 edges @ $ 1.10 per stick.

4 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia. @ $ .20 per hole.

"The above prices are as listed FOB truck job site or Cars, New York City Lighterage Limits, our option.

Decision After Trial by Byers, District Judge.

"We will notify you when we are ready for the Naval Inspector to take up this material, this inspection to be (2036) made at no charge to us.

"We will start delivery in five to six weeks and complete within 90 days, weather conditions permitting with a proposed delivery schedule of approximate one third of schedule per month.

"Terms are 2% 10 days, A. D. F., net 30 days.

"We have already supplied the Navy with the required number of copies of our order to our producer as per their request.

Please sign the original and return it for our files.

"We wish, very much, to thank you for this order and assure you that it will be given our most careful attention.

"Very truly yours,

BROWNE & BRYAN LUMBER CO., INC.

(Signed) WALTER H. ANDERSEN

Feb. 2, 1959

(Signed) OVE GUSTAVSSON
(As annotated)"

This is Plaintiff's Exhibit 5 and will be seen to call for the delivery of 1360 pieces of timber, to be bored with holes of different diameters, to receive bolts, at the stated contract price of 20 cents per hole.

(2037) 4. On April 28, 1959 defendant wrote to plaintiff re changes in size of certain of said holes:

"This is to confirm yesterdays telephone conversation as to changes in the fabrication of the timbers.

1. Change *all* counterbores in all timbers from a 3" diameter to a 3½" diameter.

2. Change size of hole into side of 12" x 12" Post from 3½" to 3⅝". * * *."

The foregoing is Plaintiff's Exhibit 7.

These required changes were at once communicated by plaintiff in writing to its fabricator of the timbers.

These several documents constitute the written contract between plaintiff and defendant. A subsequent order was given for extra lumber on September 16, 1959 and is covered by invoice of October 6, 1959.

These latter items do not enter into this controversy. It should be said that defendant now asserts that some or all of them were included in the payment by defendant to plaintiff of $2,000. on account, on December 11, 1959.

At that time defendant had not made any specific claim against plaintiff for reimbursement concerning the (2038) matters now embraced in the counterclaim in this litigation.

5. The defendant has paid $6,000. on account to the plaintiff as follows:

August	5, 1959	$2,000.
September	4, 1959	$2,000.
December	11, 1959	$2,000.

These payments were made in response to the frequent demands made by plaintiff which were not responded to, on the excuse that defendant was not receiving prompt payments from the Navy Department.

6. The written contract was modified by oral understanding between the parties reached on or about May 28, 1959 at the plant of National Wood Preservers Inc., Havertown, Pennsylvania, whereby defendant undertook

and agreed to bore holes in the timbers which by that time had not been already bored. This change was agreed to as the result of defendant's assertion that too much time was being taken by Wood Preservers and that Gustavsson could make much faster progress in that operation by using his pneumatic equipment, than by the electric power which was being used.

(2039) *Comment:*

There is no conflict in the testimony as to the fact that defendant would take over the boring of holes. The witnesses for plaintiff were Anderson, the plaintiff's salesman who negotiated the contract, and Jacoby, an officer of Wood Preservers. Gustavsson testified for defendant, but not to deny the essential fact in the foregoing finding.

7. There was no agreement that the cost of boring the holes by defendant would be at other than the contract price stated in Exhibit 5, nor was it made the subject of any written memorandum submitted by defendant to plaintiff at any time.

Comment:

It is true that Gustavsson testified that he stated to Anderson that the hole boring would be a matter of expense. He said further that as an accommodation, plaintiff would furnish certain wood borers and auger bits to defendant, and seemingly that was done. He also said that there was no discussion of the cost to defendant per hour of the drilling operation, but that "Anderson agreed to take care of it."

Anderson denies the latter statement; since this (2040) was an important element of the contract (for without

proper holes the timbers could not have been bolted into place to accomplish the fender-building job), it cannot be ignored as a mere casual incident to a discussion between the parties arising in the course of their relationship.

There were 10,880 holes to be drilled according to Exhibit 3, at an agreed cost of $2,176., of which 9,378 were taken over by defendant, with a credit to it of $1,875.

These figures make it obvious that if a change in the rate of charge involved was indeed an incident of the said modification of the contract, the defendant would have so notified the plaintiff in writing, stating the amount of the new figures or at least the need for a new computation. For failing so to do, it results that the defendant is restricted to the contract price of 20 cents per hole, for any and all hole drilling that it undertook, as the consequence of this verbal modification of the written contract. How many borings were so required is another question, which has not been demonstrated.

8. The plaintiff delivered to the defendant the timbers described in Plaintiff's Exhibit 3 according to the terms of the contract as modified according to Finding No. 7, (2041) with the exception of a few timbers that had to be replaced.

Comment:

This Finding is the crux of this case, and requires detailed exposition.

The defendant asserts a counterclaim made up of sundry elements, and they will be dealt with separately. The basic question is whether plaintiff made deliveries in accordance with its contract, and the affirmative finding in that respect is based upon these considerations:

(a) The precise respects in which the timbers were to be fabricated, i.e., the nature, characteristics and dimen-

sions of the various mechanical operations to be applied in order to render them adaptable for assembly and erection into fenders, were specified in shop drawings prepared by defendant and furnished by it to the plaintiff after approval by the Navy Department; thus Plaintiff's Exhibit 4.

Those drawings were sent to Wood Preservers which did the required work (except as to discontinuance of boring holes, as explained) on these 1,360 timbers as they were received by it from the lumber mill which was the source of supply.

The timbers were not shipped to defendant however (2042) until they had been inspected by the U. S. Navy inspector at the Wood Preserver plant. The witness Morris was the inspector and he testified that he made the required inspections at the plant by comparing the fabricated timbers with the plans and specifications (the shop drawings) and checking the material; that he certified approval by striking the end of each timber with a hammer, which caused a visible marking. Then he released the timbers for shipment. This was true except as to one "form #4" which was released without inspection. This testimony was not contradicted or questioned.

(b) The defendant argues that the timbers were not delivered in units; i.e., a complete set for each "bay." Seemingly the fenders were portions of a pier which was about 699 feet long on one side and 581 feet on the other, having an outboard width of 131 feet, composed of sections called bays. Three wales and chocks composed one bay; it may be assumed that there were also two posts to which the elements were fixed but that is not clearly stated in the evidence. It does appear, however, that Gustavsson asserts that delivery of the timbers should have been in units needed for each bay, and that because this was not done, his (2043) performance was delayed by the time required to assemble the timbers, bay by bay,

for convenient installation. It is not necessary to discuss this contention, because the contract contains no such provision, nor does any arise by necessary implication. If that had been a condition which had to be met by the plaintiff, the contract should have so specified. In the absence of such a provision, the plaintiff cannot be charged with alleged damages said to have resulted from its failure to do that which it had not undertaken, and the defendant's contentions in this respect cannot be and are not sanctioned.

(c) As to alleged delays in delivery: The contract reads in this respect:

> "We will start delivery in five to six weeks and complete wihin 90 days, weather conditions permitting, with a proposed delivery schedule of approximate one third of schedule per month."

It was stipulated that sixteen deliveries were made from April 28, 1959 to August 13, 1959, inclusive. The 90 days started to run on January 29, 1959 and expired April 29, 1959. This means that deliveries were not com- (2044) pleted within 90 days as undertaken, but that 100 additional days were required.

As to this, it is to be said that Jacoby (Wood Preservers) testified that there were some delays caused by weather conditions, rain and mud, such as were indicated in the expression as to weather conditions above quoted. There was no extra testimony on this subject. It is further a fact that some delay was occasioned by agreed changes in the size of the holes to be bored, while that was yet a part of plaintiff's undertaking. The time so involved cannot be clearly discerned from the testimony but it occurred during April, 1959.

Again, the defendant was not charged for any delay by the Government, but was paid its contract price in full.

Further, Gustavsson said he was making no claim for "stand-by" time, i.e, idle time caused by alleged failure to maintain the 90 day delivery clause, beyond May 22, 1959. Thus the time between April 29, 1959 and May 22, 1959 would encompass the delays in delivery.

For this interval of 23 days, the defendant argues that it has established its counterclaim to the extent of

(2045)

Wages paid.	$2,520.
Idle Crane	2,100.
Total	$4,620.

The testimony in support of this claim is found to be entirely unconvincing. The Government inspector Fritzson, made daily inspections of the defendant's work, and reports to his superiors to put them into a position to approve the contractor's bills for payment. He testified that from March 23, 1959 to and including May 21, 1959 he observed no stand-by time on the part of defendant, while his daily reports described the nature of the daily work in progress.

The synthetic nature of the testimony of defendant's witnesses Gustavsson and Saladino, plus the fact that the former either convinced himself to, or was persuaded that he should, testify as he did in support of the entire counterclaim, has been weighed against what the disinterested witness Fritzson said, with the result that his version is found to be the more convincing, as to both elements of this portion of the counterclaim, which is therefore disallowed.

In summary therefore as to delivery, the only default which can be charged against the plaintiff is in (2046) respect of 2,100 board feet of lumber purchased by defendant to replace certain timbers which were delivered

in a faulty condition, i.e., split or broken ends, at the proven cost of $388.50. The items so embraced are not clearly shown, but the result is deemed to have been established as stated, and so much of the counterclaim is approved.

9. The alleged corrective fabrication to the timbers delivered by plaintiff to defendant has not been shown to have been caused by plaintiff's failure to perform its contract.

COMMENT:

It is perhaps unnecessary to repeat that if the plaintiff performed its contract it is entitled to have judgment in this case. The testimony has been carefully weighed to ascertain whether defendant has sustained its burden of proof to establish that plaintiff did not so perform.

In that effort the Court has been confronted with the uncongenial task of examining into a day by day analysis of contentions that the timbers as delivered were not in conformity to the contract as to physical characteristics, of dimensions, conformation, size and position of (2047) holes, etc., with a view to reaching a conclusion on this subject.

The fact that the defendant did not reject any of the said timbers is admitted by Gustavsson, and attested to by Anderson, the plaintiff's salesman, and Burghardt, its Vice-President.

It is difficult to understand why there was no rejection or formal notice by defendant to plaintiff that it would be held financially accountable to defendant in connection with the considerable services it says it was required to render as compensation for that which it claims to have been required to do, in order to make these timbers conform to the shop drawings (Plaintiff's Exhibit 4).

No such written or formal notice was given prior to January 21, 1960, when defendant's Exhibit K was handed to Anderson. That was nine days after the Bonding Company acknowledged plaintiff's letter of January 5, 1960 by which the latter called attention to defendant's failure to pay the balance due under the contract.

The correspondence in that connection is found in Plaintiff's Exhibit 11 and 11A, the first being a letter addressed to the Bonding Company, dated January 5, 1960, and (2048) contains the following:

> "This is to advice you that we are one of the prime material suppliers for this project to Ove Gustavsson and that a substantial quantity of material is still unpaid for."

The second is the acknowledgment of January 12, 1960 and contains the following:

> "I have been informed that our principal is in no financial difficulty and that this indebtedness will be cleared up in due course."

The plaintiff had written to the defendant on September 10, 1959 [Exhibit 18] as follows:

> "We wish, at this time, to point out to you your long outstanding balance.
>
> "We note that a payment of $2,000.00 was made by you on September 4th, leaving an unpaid balance of $20,080.57.
>
> "A check from you, to substantially reduce this long overdue account, would be greatly appreciated."

The failure of Gustavsson to present to the plaintiff any demand for payment of a sum of money deemed by the defendant to be due as the result of the various mat-

ters (2049) now constituting the defendant's counterclaim, until after the correspondence with the Bonding Company, cannot be ignored in exploring the subject of the plaintiffs' performance of its written contract.

As has been written, there was no claim advanced by Gustavsson until January 21, 1960, at which time he handed to Anderson a pencil memorandum, six pages long, purporting to indicate work that the defendant had been required to perform in connection with the timbers delivered by the plaintiff. This is Defendant's Exhibit K, and purports to contain various sub-totals following the words "Total man hours" and certain items which need not be here repeated; among them is "Layout of holes, dadoes, chamfers, etc., $800." It is not possible to state a total in dollars of the amount seemingly asserted in this memorandum. The significant part of the picture is that this was the first occasion on which the plaintiff was confronted with anything like a demand for a sum of money allegedly owing by the plaintiff to the defendant.

If that memorandum had been handed by Gustavsson to the plaintiff prior to the writing by the latter of the letter above quoted to the Bonding Company, it would at least (2050) be consistent with his belief that he ought to confront the plaintiff with a demand for a sum of money based upon an asserted failure on the part of the plaintiff to perform its contract. Of course it would not follow that he was justified in making the claim, but at least such an action would have offered a striking contrast to the belated assertions in Exhibit K.

The failure on the part of Gustavsson to advance such a claim prior to the time that his interests were taken in charge by the attorney for the Bonding Company cannot be disregarded in weighing the testimony of Gustavsson and Saladino on the essential issue of plaintiff's performance of its contract.

Decision After Trial by Byers, District Judge.

In this connection, it has not been overlooked that Anderson testified that when he and Burghardt interviewed Gustavsson in connection with Exhibit K and in an effort to avoid litigation by making a reasonable settlement, the offer which they made was stated by Gustavsson to be acceptable to him but that he must first consult his attorney because he was not "a free man." That testimony was not denied and has necessarily entered into an appraisal of the good faith of the defendant's entire case.

(2051) Many of the various elements of the defendant's counterclaim as argued, long antedate the plaintiff's written demand contained in Exhibit 18, and it is difficult to reconcile those claims with the payments on account which have been above stated because it strains the Court's credulity to insist that beginning on March 23, 1959 and continuing through June 16, 1960, Gustavsson was secretly building up a claim for money damages totalling $21,918.56, without giving any notice whatever to the plaintiff that such a demand was in the process of accumulation.

The item of corrective fabrication totals $9,867.50 based upon what are said to be Gustavsson's records, but the entire item is lacking in specific data. In this connection, if any testimony had been offered that a given number of timbers delivered at or about a given time were deficient, and that notice thereof had been given to the plaintiff, it would be possible to accord to this branch of the testimony greater weight than this Court is able to bring to bear.

The item of $3,400. alleged to be for the use of the crane owned and operated by the defendant, cannot be given serious consideration for two reasons:

(2052) (a) It was part of the defendant's equipment which he was supposed to use in the performance of his contract with the Navy, and presumably entered into the

computation of the total charge that he submitted to the Government.

(b) There is no mention of any such item in Exhibit K, which clearly characterizes it as a remote afterthought, created elsewhere than in Gustavsson's office.

The same remark applies to the use of other items of equipment that Gustavsson must have expected to use when he entered into the contract with the Navy Department; also items for the use of compressed air.

With reference to the cost of layout [$800.], this item is not understood. Of course when Gustavsson purchased these timbers, he understood that he had to assemble them in order to perform his contract with the Navy.

Taken as a whole, the defendant's testimony is entirely unconvincing as to the plaintiff's failure to perform its contract. It may be that Gustavsson had more work to do for the Navy than he anticipated at the time that he entered into the main contract; it may be that there were changes directed by the Navy which entailed the rendition of services over and beyond the original contemplation of (2053) Gustavsson, but even if these assumptions are true, it does not follow that the plaintiff has not substantially performed the contract heretofore explained, except as to the item of $388.50 mentioned in the Comment under Finding Number 8.

Conclusion of Law

The defendant's counterclaim is disallowed and judgment is directed to be entered for the plaintiff in the amount of $19,459.75, with interest and costs.

If additional findings are desired, they may be settled on notice.

M. W. B.
U. S. D. J.

Decision of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 271—September Term, 1961.

(Argued March 28, 1962 Decided June 7, 1962.)

Docket No. 27348

THE UNITED STATES OF AMERICA for the Use and Benefit of BROWNE & BRYAN LUMBER CO., INC.,

Plaintiff-Appellee,

—against—

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Defendant-Appellee,

—and—

OVE GUSTAVSSON CONTRACTING CO., INC.,

Intervenor-Appellant.

Before:

MEDINA, SMITH and HAYS,

Circuit Judges.

Appeals from a judgment and from an order of the United States District Court for the Eastern District of New York, Mortimer W. Byers, *Judge.*

Ove Gustavsson Contracting Co. Inc., intervenor and general contractor, in an action under the Miller Act, 40 . . .

U. S. C. Sections 270a, 270b, against the surety furnishing a performance and payment bond in connection with repair work for the Government, appeals from a judgment in favor of a materialman subcontractor who furnished lumber for the job, awarding damages for the amount agreed to be paid for the lumber, less a small allowance for replacement of damaged items, and dismissing the counterclaim of intervenor. The intervenor also appeals from an order striking the name of Massachusetts Bonding and Insurance Company from the notice of appeal as a co-appellant on the ground that the attorney who represented both the surety and the intervenor at the trial had no authority to appeal on behalf of the surety. Opinion below is reported at 195 F. Supp. 26. Affirmed.

WILLIAM V. HOMANS, New York, N. Y. (Philip G. FITZ, New York, N. Y., on the brief), *for plaintiff-appellee.*

MAX J. LE BOYER, Brooklyn, New York, *for defendant-appellee.*

ANTHONY B. CATALDO, New York, N. Y., *for intervenor-appellant.*

MEDINA, *Circuit Judge*:

There are two appeals before us. The first involves the merits in an action in effect for goods sold and delivered, with a counterclaim for damages for alleged delay, delivery of defective material and a congeries of miscellaneous subsidiary and related claims. The trial judge granted judgment for the amount agreed to be paid for the goods,

less an allowance of $388.50 expended in the replacement of a small amount of damaged lumber; and he dismissed the counterclaim in its entirety. The second appeal is from an order granting a motion by an alleged co-appellant to strike its name from the notice of appeal because it had not authorized the appeal to be taken. The opinion below is reported at 195 F. Supp. 26.

The proliferation of issues, the numerous briefs, appendices, letters and memoranda, and the fact that some eight motions have been made by appellant in this Court during the pendency of the appeals, make it desirable, we think, to state in simple, chronological sequence the development of the controversy and its progress after the commencement of the action. We shall insert a few parenthetical comments for the purpose of disclosing the sequence of events as an integral whole. The action is by a materialman under the Miller Act, 40 U. S. C. Sections 270a, 270b, against the surety for the principal contractor. The same attorney represented both the surety and the principal contractor throughout, and, some time after joinder of issue the principal contractor was permitted to intervene and assert its counterclaim or set-off against the subcontractor-plaintiff.

On December 12, 1958 appellant Ove Gustavsson Contracting Co. Inc. contracted with the United States to furnish all labor, equipment and materials for the repair of the seal wall and replacement of fenders on Pier G in the Brooklyn Navy Yard. A performance bond of $158,768 and a payment bond of $79,384 conditioned for the prompt payment of all persons supplying labor and materials in connection with the contract were required and were executed and delivered by Massachusetts Bonding and Insurance Company and accepted by the Government.

The contract with the subcontractor, as found by the trial judge, is an exhibit written on the letterhead of the

materialman-plaintiff, Browne & Bryan Lumber Co., Inc., under date of January 29, 1959 and signed by Gustavsson on February 2, 1959. The lumber to be delivered and the necessary details relative to sizes and fabrication are set forth, del very to start "in five or six weeks and complete within 90 days, weather conditions permitting with a proposed delivery schedule of approximate [sic] one third of schedule per month." Hereafter we shall refer to the parties as Gustavsson, the Lumber Company and the surety.

There was a subsequent order for additional lumber on September 16, 1959, covered by an invoice of October 6, 1959. The pertinence of this relates only to one of the many peripheral issues, as to whether a payment of $2,000 by Gustavsson to the Lumber Company on December 11, 1959 was of the amount or part of the amount due for the additional order or on account of the large balance due for deliveries of lumber pursuant to the terms of the contract of January 29, 1959.

The substance of the state of affairs before the commencement of the action by the Lumber Company against the surety was that the Lumber Company had a claim for $25,848.25 for goods sold and delivered, against which it had received only three payments of $2,000 each, on August 5, 1959, September 4, 1959, and December 11, 1959. The last delivery of lumber on the job was August 13, 1959; and it was conceded at the trial that the lumber was used on the job by Gustavsson. The Government paid Gustavsson the full amount specified in its contract, $158,768, plus $37,025 for extras, or a total of $195,793, without any penalty for delay. And yet the claim of the Lumber Company remained unpaid. Other materialmen were also clamoring for the money due them.

After getting little or no satisfaction out of Gustavsson, the Lumber Company wrote the surety on January 5, 1960 complaining of the delay, and the reply of the surety on

January 12, 1960 was to the effect that Gustavsson was "in no financial difficulty and that this indebtedness will be cleared up in due course." It was not cleared up, however, and the Lumber Company commenced this action on April 6, 1960.

Despite the fact that the Miller Act was designed to provide a prompt means of satisfying the claims of those furnishing labor and materials for use on construction or repair work for the Government, this litigation is still in progress and the record before us discloses a pattern of dilatory tactics, including the series of delaying moves in this Court, that is much to the discredit of the administration of justice. Moreover, in retrospect it is difficult to see how much of this could have been avoided, as it was not until the lapse of twelve full days of trial before an exceptionally patient and considerate judge that the testimony of both Ove Gustavsson, President of Gustavsson, and its other principal witness was found to be false, and Gustavsson's documentary evidence branded as dubious and unreliable.

The answer of the surety was not filed until August 30, 1960. The attorney was the same attorney who later represented Gustavsson on the motion to intervene, and who acted as counsel at the trial for both the surety and Gustavsson. No jury trial was demanded at the time of filing the answer of the surety. In this answer it was alleged as a defense that the lumber was not delivered in time, that when it was delivered it was damaged and in a raw and unfabricated condition and that Gustavsson had rejected it. It was also alleged by way of defense that the District Court had no jurisdiction of the case, that the Lumber Company had no capacity to sue and that Gustavsson was an indispensable party.

As early as September 6, 1960, as disclosed by the papers on file in the case, Ove Gustavsson, President of Gustavsson, signed and swore to the affidavit annexed to the notice

of motion later made for an order permitting Gustavsson to intervene. This notice of motion was originally dated September 6, 1960 but was partially erased and November 26, 1960 substituted. The reason for waiting to serve the motion papers on the motion to intervene is all too plain. The attorney thought he had an ace in the hole, a possible means of obtaining substantial further delay, in the form of a demand for a jury trial, to be stated in the "Intervenor's Plea," the pleading attached to the notice of motion and proposed to be served if Gustavsson's motion for leave to intervene should be granted; and it was thought expedient to delay the making of the motion until other dilatory maneuvers had failed.

The Lumber Company noticed the case for trial and filed a statement of readiness. The attorney for the surety filed an affidavit of non-readiness in which no mention is made of any forthcoming motion to intervene or of any demand for a jury trial. Judge Rayfiel held a hearing on November 22, 1960 and declared the case ready.

The motion to intervene, while returnable on December 7, 1960, was not argued before Judge Mishler until December 21, 1960. In the meantime, the customary pre-trial conference was held before Judge Bartels on December 16, 1960, and the case was set down on the non-jury calendar for the week of January 19, 1961, "the case to be tried when reached." True it is that Judge Bartels was informed that Gustavsson "is moving to intervene," but nothing was said of the fact that the motion papers had been prepared long prior to the time Judge Rayfiel marked the case ready for trial, but had been held in reserve.

January 5, 1961, Judge Mishler granted the motion to intervene on condition that Gustavsson waive a jury trial and be ready for trial when the case appeared on the calendar for trial. The waiver was filed, but imposition of this condition is one of Gustavsson's points on the appeal from the judgment.

The "Intervenor's Plea" amplifies what was alleged in the answer prepared by the same attorney and filed on behalf of the surety. Instead of alleging that the lumber was rejected, however, Gustavsson asserts that in order to induce Gustavsson to accept damaged, defective and unfabricated lumber the Lumber Company agreed to pay Gustavsson the fair and reasonable cost of dressing and fabricating the lumber, to "furnish whole lumber in exchange for and in place of the lumber received in damaged condition," and to pay damages for delays in delivery. Without attempting further to amplify the details, the "Intervenor's Plea" concludes with a demand for judgment against the Lumber Company in the sum of $23,500.

After a careful scrutiny of the testimony and the large number of exhibits Judge Byers decided that he did not believe the witnesses who testified on behalf of Gustavsson. He found this testimony "unconvincing." He described the testimony of the principal witness as "synthetic." The most charitable view of what Judge Byers thought of the Saladino Log and Exhibit K, strongly relied upon by Gustavsson on this appeal, is that they were wholly unreliable supports for Gustavsson's fantastic claims.

As Judge Byers credited the testimony of the witnesses for the Lumber Company and did not believe the testimony of Gustavsson's witnesses, we are at a loss to discover any basis for a reversal of the judgment on the merits. True it is that Gustavsson himself and Saladino, his engineer, were ready at all times to say they saw this and saw that, or had conversations with various persons, and much of this is not contradicted in the sense that witnesses were called to controvert every detail of what these witnesses testified to. The fact remains that Judge Byers rejected their testimony on the ground that he did not believe it and no phase of the testimony thus rejected can be considered by us as a basis for setting aside a finding as clearly

erroneous. Moreover, contrary to the assertion of counsel, it is the law that testimony deemed not credible may be disregarded by the trier of the facts, even though such testimony has not been stricken from the record.

In view of the general atmosphere of confusion that seems to have settled upon the case, as revealed in the numerous briefs, letters and memoranda filed with us prior and subsequent to the oral argument, and the persistence with which counsel for Gustavsson has made various and sundry representations and claims to the effect that the rejection of Gustavsson's counterclaim is unjust and not to be sustained on the law or the facts, we have been at particular pains to study the whole transcript of the trial and the exhibits, as well as the briefs, letters and memoranda. The result is that we are convinced by the record as a whole that there is no basis upon which we could set aside any of the findings as clearly erroneous. Indeed, we do not see how the trial judge could very well have arrived at a different conclusion.

It would be a tedious and unprofitable task to attempt to discuss the pros and cons of the large number of miscellaneous issues of fact. We shall, however, make brief reference to a few of the basic ones.

There was some delay in the delivery of the lumber. Some of this was due to weather conditions, as testified by the witness Jacoby; and some was due to agreed changes in the size of the holes to be bored. No credible evidence was submitted by Gustavsson to establish the amount of delay attributable to the Lumber Company or to establish any damages arising out of such delay.

One of the principal issues of fact related to an oral agreement made on May 28, 1959, relative to the boring of the holes in the lumber. It was Gustavsson's claim that he was to take over the boring of the holes and that the Lumber Company agreed to pay the reasonable cost of

doing the boring. The Lumber Company's witness Anderson, on the other hand, testified that Gustavsson was to take over the boring of the holes and that the Lumber Company would not charge for the drilling of the holes. As Jacoby, who was also present at the conversation, put it, the "charge was being eliminated from the contract." This meant a credit to Gustavsson of $1875, at the contract rate of 20 cents per hole, which the Lumber Company allowed in calculating the sum for which suit was brought. As the trial judge rejected Gustavsson's testimony, there resulted Finding 7 to the effect that the agreement claimed by Gustavsson was not made and the modification did no more than eliminate, from and after May 28, 1959, the 20 cent per hole charge to be made according to the original arrangement.

Gustavsson also claimed that the lumber was not delivered in units, so that each unit could be conveniently assembled for each of the numerous "bays" on the pier. The answer to this was that the contract made no provision for deliveries in units, nor were the circumstances such as to give rise to any such agreement by implication.

The crux of the case is Finding 8, as follows:

> "The plaintiff delivered to the defendant the timbers described in Plaintiff's Exhibit 3 according to the terms of the contract as modified according to Finding No. 7, with the exception of a few timbers that had to be replaced."[1]

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[1] Prior to the execution of the contract of January 29, 1959, referred to in an earlier portion of this opinion, there was a letter (Exhibit 2) from the Lumber Company to Gustavsson of December 15, 1958, making certain quotations. On this letter Gustavsson had written "OK to proceed with ordering lumber hold fab. for confirmation." Exhibit 3 is another letter from the Lumber Company to Gustavsson of January 16, 1959 enumerating the items of lumber. The necessary details for fabrication appear in the contract of January 29, 1959 (Exhibit 5).

What Gustavvson's inflated and unsubstantiated counterclaim of $23,500 boiled down to was about 2100 feet of damaged lumber that were replaced by Gustavsson at a cost of $388.50, and this amount was deducted by the trial judge from the judgment awarded against the surety. On this state of the record we think the trial judge quite properly applied the doctrine of substantial performance. See *United States ex rel. Johnson* v. *Morley Const. Co.*, 2 Cir., 1938, 98 F. 2d 781, cert. denied, 305 U. S. 651; *Inhabitants of City of Plainfield* v. *Palmer*, 3 Cir., 1934, 72 F. 2d 312; *American Steel & Iron Co.* v. *L. B. Foster Co.*, Sup. Ct., 1932, 148 Misc. 727, 266 N. Y. S. 800, aff'd, 1933, 238 App. Div. 882, 262 N. Y. S. 1008, aff'd, 262 N. Y. 623, 188 N. E. 92; compare N. Y. Personal Property Law, Section 150.

Continuing our chronological summary we come to a bitter controversy that arose between Gustavsson, or its attorney, and the surety after the entry of judgment. On the basis of what the attorney for Gustavsson or Gustavsson's president had represented the facts to be the surety authorized Gustavsson's attorney to defend the action on its behalf and he did so. It was this same attorney, as we have already said, who filed the motion of Gustavsson to intervene and who actively represented both the surety and Gustavsson at the trial. When it turned out at the trial that Gustavsson's representations were not substantiated and that there appeared to be little likelihood that this Court would reverse an experienced and able trial judge on the ground that his findings of fact based upon the credibility of witnesses were clearly erroneous, there very naturally arose the question of whether the surety would authorize an appeal and perhaps throw good money after bad.

The attorney urged the surety to authorize him to appeal to this Court on behalf of the surety. The reply was that

the surety would not do this unless furnished with full cash collateral. No such collateral was forthcoming. But the attorney appealed just the same, and he did so on behalf of both Gustavsson and the surety. The surety promptly moved to delete its name from the notice of appeal. The motion was vigorously opposed, on the ground, among others, that the District Court had no jurisdiction to decide the matter. The motion was thereupon referred to Judge Byers, who took the matter under advisement and filed an interim memorandum suggesting clarification of the attorney's position. The only clarification that was forthcoming was an affidavit on behalf of the surety reiterating its position that it had not authorized the appeal on its behalf, together with a stipulation substituting Max J. Le Boyer for Arthur H. Hayman, the former general counsel for the surety, who had died, and reference was made to the following clause of the indemnity agreement between Gustavsson and the surety:

> "The Company shall have the exclusive right to decide and determine whether any claim, demand, liability, suit, action, order, judgment or adjudication, made or brought against the Company on the bond or bonds herein applied for, shall or shall not be defended, tried or appealed, and its decision shall be final, conclusive and binding upon the undersigned, and any order, judgment or adjudication made, entered or affirmed as a result thereof, or any loss, cost, charge, expense or liability thereby incurred, sustained or paid, shall be borne by the undersigned and the undersigned expressly thereto consents."

Thereupon Judge Byers granted the motion and Gustavsson appealed.

Except for the point relative to the jurisdiction of the District Court, to which we shall return, the arguments

of counsel for Gustavsson read like Alice in Wonderland. He insists that the interim memorandum constituted a denial of the motion by Judge Byers, that the decision made later was an unauthorized and improper reversal of the allegedly prior decision, that all this was done without notice to Gustavsson and amounts to a deprivation of constitutional rights, as a denial of due process of law.

The plain fact is that authority to take the appeal on behalf of the surety was refused. It was refused in the exercise of a right reserved to the surety in its contract of indemnity for its protection in just such a situation as the one in which it found itself after the filing of the opinion and findings of Judge Byers after the trial. There was but one decision of the motion to strike and there was more than ample notice and opportunity for Gustavsson to submit any affidavits or other proof that might have been available in opposition to the motion.

On the jurisdiction question it is generally true that the service of a notice of appeal takes a matter out of the control of the District Court. But here the motion to strike was made promptly and the appeal was not docketed until January 16, 1962. The order granting the motion to strike was settled on notice and was filed on November 13, 1961. The last sentence of Federal Rules of Civil Procedure, Rule 73(a) seems clearly applicable. It reads:

> "If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant."

This is a case where a purported appellant moves to dismiss and we think the District Court had jurisdiction to decide the motion.

In any event, it is clear to us that this Court has power to act and we here and now, on the basis of the evidence before us, strike out the name of Massachusetts Bonding and Insurance Company from the notice of appeal.

We think it of no significance in connection with either of the two appeals before us that Hanover Insurance Company, with which the Massachusetts Bonding and Insurance Company has merged, has paid $20,000 and taken an assignment of the judgment from the Lumber Company.

We have given the most careful consideration to the point about the demand for the jury trial. It is important that this fundamental right be preserved intact and not eroded by unsympathetic interpretation or the imposition of conditions designed to clear up the calendars of the courts. We sustain the action of Judge Mishler in granting the motion to intervene on condition that there be filed a waiver of jury trial, and we do so only because of the peculiar circumstances of this particular case and because we believe the dilatory tactics here practiced and other maneuvers that we find it not necessary to describe in detail are not to be condoned.

Both the judgment and the order appealed from are affirmed.

Decision of Court of Appeals on Petition for Rehearing.

[SAME TITLE]

Before MEDINA, SMITH and HAYS, Circuit Judges.
On Petition for Rehearing.

Anthony B. Cataldo, New York, N. Y.,
for intervenor-appellant.

Petition denied.

/s/ HAROLD R. MEDINA
/s/ J. JOSEPH SMITH
U. S. C. JJ.

July 3rd, 1962

Statute Granting Jurisdiction

Title 28 U.S.C.A. Section 1254.

Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

• • •

Article VI, Clause 2 of the United States Constitution.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article VI, Clause 3.

United States Constitution.

Clause 3. The Senators and Represenstatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Amendment 7.

United States Constitution.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 38(a) and (b) of the Rules of Federal Civil Procedure.

Rule 38. Jury Trial of Right.

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

* * *

Rule 39 (a) of the Rules of Federal Civil Procedure.

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or Statutes of the United States.

Rule 24(a) of the Rules of Federal Civil Procedure.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;

* * *

The Miller Act.

40 U.S.C.A. Section 270a.

270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided

for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 percentum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

The Miller Act.

40 U.S.C.A. Section 270b.

270b. Same; rights of persons furnishing labor or material (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety

days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshall of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.